SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1219

IRVING MALBIN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION

I

Opinions Below

The opinion is reproduced at length in Appendix "A" hereto annexed.

II

Jurisdiction

1. The date of the judgment to be reviewed is May 10th, 1946.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347 (a)).

III

Statement of Facts and Questions Presented

The facts and questions involved have already been stated in the preceding petition, which statement is hereby adopted and made a part of this brief.

Point I

The Information Was Filed Contrary to the Statute and the Prosecution Is Unauthorized as it Lacks the Required Statutory Certificate to the Attorney-General.

Congress clearly defined a crime in Title 50, U. S. C. Appendix, Section 925 (b) by a definition and a punishment and provided that when the Administrator had reason to believe that any person was liable to punishment thereunder, he may certify the facts to the Attorney-General, who in his discretion could cause appropriate proceedings to be brought. A person liable to punishment thereunder could only be one who violated its provisions. To hold that a routine prosecution by the United States Attorney will lie, is to make meaningless the provisions for the Attorney-General's discretion.

In enacting this section, it is clear that Congress intended to put a substantial check upon the Office of Price Administration. It did not intend that every petty violator of a ceiling price should be subject to a jury trial in the United States Courts and it placed in the wise and capable hands of the Attorney-General the discretion to pass upon the facts and the offense, and direct appropriate proceedings to be brought, if any.

There is no denial that the facts were not certified to the Attorney-General and it is respectfully urged that the filing of the Information was unauthorized and that the prosecution is in violation of the statute.

Point II

The Regulation Never Became Effective and Is Invalid, Lacking the Statutory Approval of the Secretary of Agriculture.

Section 2 of the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23; 50 U. S. C. A. APP. Section 902), subject to certain reservations applying to agricultural commodities and products processed therefrom, purports to authorize the Price Administrator to fix maximum prices of various commodities, including meats.

Section 3(c) of the Act (Section 903(c) of 50 U. S. C. A. APP.) qualifies the authority of the Price Administrator, as to commodities processed or manufactured from any agricultural commodity, as follows:

> "No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a)."

It cannot be doubted that a side of beef, and other meat products, such as are mentioned and described in the Information, are processed from an agricultural commodity; that is, live stock. This is made clear by Section 3 of the Inflation Control Act of 1942 (Section 963 of 50 U. S. C. A. APP.), which provides, *inter alia:*

> "That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing,"

the Congress thus making certain that livestock shall be classified as an agricultural commodity.

The beef is in its original state and is the result of slaughtering a steer and cutting and dividing it into parts. No change, chemical or otherwise, takes place. Nothing is added nor subtracted from it. It is placed in cold storage for the very purpose of keeping its identity and quality.

Commonwealth v. *Clark*, 344 Pa. 155, Atl. (2d) 143;
Florida Packing & Ice Co. v. *Carney*, 51 Fla. 190;
Kennedy v. *State Board*, 224 Iowa 405, 276 N. W. 205.

The authority of the Administrator to regulate the prices of agricultural commodities, and of products processed from such commodities, was limited narrowly to such regulations as should be approved by the Secretary of Agriculture. Section 3(e) of the Act (Section 903(e), 50 U. S. C. A. APP.) provides:

> "notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture * * *."

Examination of Regulation No. 169 (7 Fed. Reg. No. 10381) shows that it was never approved by the Secretary of Agriculture, or by the Food Administrator, as required by law, at any of the times mentioned in the Information. In the absence of such approval, Regulation No. 169 never became effective and valid. Hence, an Information based thereon, as here, does not charge an offense against the laws of the United States.

Point III

Regulation No. 169 Was Rescinded by Regulation No. 574

The defendant is charged with violating Regulation No. 169, on June 6, 1944, and June 12, 1944. At that time the Regulation fixed maximum prices for wholesalers but placed no ceiling on live cattle which could be sold at any

price. In June, 1944, wholesalers were required to pay more for their products than they were allowed to charge for them.

On January 29, 1945, the Administrator issued Maximum Price Regulation No. 574 fixing a ceiling on live cattle.

In answer to protests filed against Regulation No. 169, the Administrator took the position that Regulation No. 574 eliminated any argument that Regulation No. 169 was invalid because it failed to fix ceiling on live cattle.

It is urged that at the time of the offense herein Regulation No. 169 was arbitrary, unfair and ruinous to a wholesaler. He had to buy and handle beef and sell at a price less than he paid. It was so clearly invalid that the only answer to it was Regulation No. 574. The promulgation of No. 574 must be taken as an admission of the invalidity of Regulation No. 169. The alleged crime herein was on June 6 and 10, 1944, and Regulation No. 169 was then in effect. Regulation No. 574 became effective January 29, 1945. We contend that the Administrator in effect rescinded Regulation No. 169 and declared it invalid by reason of the absence of ceilings on live cattle prior to January 29, 1945, and therefore its invalidity existed in June 1944, and the Information herein failed to charge an offense.

Conclusion

For the reasons set forth, it is respectfully submitted that the District Court erred in refusing to grant the motion in arrest of judgment and the motion to vacate and set aside the judgment.

Respectfully submitted,

JACK KRANIS,
Counsel for Petitioner,

A. HARRY WEISSMAN,
Of Counsel.

Dated: May 10, 1946.